Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

WILLIAM E. ROUSSIN,

Petitioner,

v.

THE STATE OF MISSOURI,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Pursuant to Supreme Court Rule 10.1(a) the Court of Appeals has rendered a decision in conflict with the decision of another U.S. Court of Appeals and in conflict with its own previous decision on the same matter. Said questions are hereby presented to the Court for review:

1. Whether the grand jury materials and information sought by the Respondent State of Missouri constitute "matters occurring before the grand jury" pursuant to Rule 6(e) Fed. R. Crim. Pro. thereby prohibiting their release contrary to the ruling of the Court of Appeals.

2. Whether Respondent made a showing of "particularized compelling need" for release of the requested information pursuant to the applicable case law as held by the Court of Appeals.

Pursuant to Supreme Court Rule 10.1(c) the Court of Appeals decided an important question of federal law which has not been but should be settled by this Court and pursuant to Rule 10.1(a) in so doing departed from the accepted and usual course of judicial proceedings said question is hereby presented to the Court for review:

3. Whether the Court of Appeals properly considered the sealed statement of Assistant U.S. Attorney DAVID JONES and whether this constitutes a Fifth Amendment violation.

Pursuant to Supreme Court Rule 10.1(c) the Court of Appeals has decided a federal question in a way that conflicts with applicable decisions of this Court pursuant to Rule 10.1(a) the Court of Appeals has so far departed

QUESTIONS PRESENTED FOR REVIEW – Continued

from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power and supervision:

4. Whether the Court of Appeals gave any basis for its decision other than a "cost-savings", whether that reason was accurately arrived at and if so whether that reason standing alone can be dispositive and constitutes a Fifth Amendment due process violation.

5. Whether the Court of Appeals properly denied Petitioner's request to have a hearing on Respondent's Motion for Access, etc. thereby denying Petitioner Fifth Amendment due process.

6. Whether the Court of Appeals failed to require that the District Court comply with the initial threshold six condition test set forth in *U.S. v. Armco Steel Corp.*, 458 F.Supp. 784 (1978) thereby denying Petitioner Fifth Amendment due process.

7. Whether the Court of Appeals incorrectly ruled on the issue of whether the U.S. District Court, Western District of Missouri, should have transferred Petitioner's request to the U.S. District Court, Eastern District of Missouri where the civil action was pending and failed to consider that the District Court failed to review the documents sought to be disclosed thereby denying Petitioner Fifth Amendment due process.

LIST OF ALL PARTIES

1. Respondent: State of Missouri by John Munich, Assistant Attorney General, P.O. Box 899, Jefferson City, MO 65102.

2. Petitioner: William E. Roussin, Pro Se, Reg. No. 23152-044, P.O. Box 6000, Greenville, IL 62246.

TABLE OF CONTENTS

Page

Questions Presented for Review i

List of All Parties iii

Table of Contents..... iv

Table of Authorities v

Official and Unofficial Reports of Opinions Delivered in the Case by Other Courts 1

Jurisdictional Statement 1

Statement of the Case 2

Reasons for Granting the Writ of Certiorari 4

Conclusion 30

TABLE OF AUTHORITIES – Continued

Page

Collins v. Superior Court of L.A. County, 150 Cal.App.2d 354, 310 P.2d 103 20

Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979) 8, 15, 16, 28

Fullock v. St. Charles, 602 S.W.2d 860 (Mo.App. 1980) 21, 25

Fairbanks v. Alaska Public Utilities Com., 611 P.2d 493 (Alaska 1980) 21

Goldberg v. Kelly, 397 U.S. 254, 25 L.Ed.2d 287 20

Hansson v. Catalytic Construction Co., 127 A.2d 431 (N.J. Super 23) 20

Hickman v. Vally Local School Dist. Bd. of Ed., 513 F.Supp. 659 (SD Ohio 1981) 8

Huber v. United States, 838 F.2d 398 (CA9 Cal. 1988) 19

Illinois v. Abbot & Assocs., Inc., 460 U.S. 557 16

Illinois v. Sarbaugh, 552 F.2d 768 (7th Cir. 1977) 8

In Re Grand Jury, etc., (1979 ND.W.Va.) 82 FRD 70 ..... 11, 16, 24

In Re Grand Jury Proceedings Relative to Perl, 838 F.2d 304 (8th Cir. 1988) 9, 10, 18, 22

In re Holovachka, 317 F.2d 834 (7th Cir. 1963) 8

In re Matter of Special March 1982 Grand Jury, 753 F.2d 575 (7th Cir. 1985) 6

In Re Miami Federal Grand Jury No. 79-8, 478 F.Supp. 490 (1979 SD Fla) 12

TABLE OF AUTHORITIES – Continued

Page

In re Special February 1971 Grand Jury v. Conlisk, 490 F.2d 894 (7th Cir. 1973) 8

In Re Special February 1975 Grand Jury, 652 F.2d 1302 (CA7 Ill. 1981) 7

Matter of Disclosure of Testimony, etc., 580 F.2d 281, 286 (1978) 18, 22

Miami Federal Grand Jury, 478 F.Supp. 490 (S.D.Fla. 1979) 16, 24

Senate of Commonwealth of Puerto Rico on Behalf of Judiciary Committee v. U.S. Dept. of Justice, 825 F.2d 574 (1987 App. DC) 13

State v. Shaw, 847 S.W.2d 768 (Mo.App.) 19

U.S. v. Armco Steel Corp., 458 F.Supp. 784 (1978) *passim*

U.S. v. Beatty, 587 F.Supp. 1325 (1984 ED NY) 13

U.S. v. Interstate Dress Carriers, Inc., 280 F.2d 52 (2d Cir. 1960) 5, 6

U.S. v. John Doe, 481 U.S. 102 (1987) 13, 17, 18, 24

U.S. v. Phillips, 843 F.2d 438 (11th Cir. 1988) 6

U.S. v. Proctor and Gamble Co., 356 U.S. at 677, 682 (1958) 18, 22

United States v. Dynavac, Inc., 6 F.3d 1407 (9th Cir. 1993) 14, 15, 17

Wolf v. McDonnell, 418 U.S. 539, 41 L.Ed.2d 935 .....20, 21, 25

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS

1. Opinion of the United States Court of Appeals, Eighth Circuit styled "In Re: Grand Jury Investigation of William L. Webster, et al. on appeal State of Missouri v. R&R and S.K.R., Nos. 94-3242 and 94-3243 and State of Missouri v. W.E.R., No. 94-3241 of May 5, 1995.

2. Orders of the United States District Court, Western District of Missouri, Southern Division styled "In Re: Grand Jury Investigation of William L. Webster, et al., No. 94-MC9015 under seal" (not reported) of 08/01/94, 08/09/94 and 08/19/94.

3. Order of United States District Court, Eastern District of Missouri, Eastern Division styled State of Missouri v. William E. Roussin, et al., No. 4:93CV2633 DJS (not reported) of 01/14/94.

4. Opinion of the United States Court of Appeals, Eighth Circuit denying rehearing dated 06/29/95.

JURISDICTIONAL STATEMENT

The Supreme Court of the United States has jurisdiction of this matter pursuant to 28 U.S.C.A. § 1254 and Supreme Court Rule 10.1(a) and (c). The date of entry of the judgment of the U.S. Court of Appeals, Eighth Circuit is May 5, 1995 which Petitioner seeks this Court to review. The date of entry of the Order respecting rehearing of the U.S. Court of Appeals, Eighth Circuit is June 29, 1995 which Petitioner seeks this Court to review.

The following constitutional provisions, statutes, rules and ordinances are involved in the case:

1. Fed. R. of Crim. Pro. 6(e). Set forth in total in Petitioner's Appendix.

2. Amendment V, United States Constitution. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

STATEMENT OF THE CASE

The State of Missouri, Respondent herein, initiated this cause of action in the United States District Court, Western District, Southern Division, styled In Re Grand Jury Investigation Relative to William L. Webster by the filing of its Motion for Access to Grand Jury Documents, etc. and Memorandum in Support thereof under Case No. 94-MC9015. Petitioner filed its Motion to Intervene, Motion for a Hearing and Motion in Opposition to Respondent's Motion for Access to Grand Jury Documents, etc. Respondent sought this information in connection with its civil action Complaint for damages filed in U.S. District Court, Eastern District, Case No.

4:93CV2633 DJS. Petitioner challenged Respondent's motion on eight (8) grounds (1) Respondent was not the real party in interest thereby lacking standing whereby the District Court lacked federal jurisdiction; (2) Respondent was precluded from filing its grand jury motion for failing to comply with Fed. R. of Civ. Pro. 9(b) in its civil complaint for damages in the Eastern District; (3) Respondent was precluded from access to grand jury materials per its request by Fed. R. of Crim. Pro. 6(e) because the information sought constituted "matters occurring before the grand jury"; (4) That Respondent failed to make a showing of "particularized need" for release of the requested information; (5) That the District Court should hold a hearing before ruling on Respondent's Motion for Access; (6) That the District Court should not consider a sealed statement of Assistant U.S. Attorney DAVID JONES or should unseal the same and allow Petitioner to respond; (7) That Respondent was precluded from access because it failed to comply with the initial threshold six condition test set forth in *U.S. v. Armco Steel Corp.*, 458 F.Supp. 784 (1978); (8) That the Western District Court should have transferred the matter to the Eastern District where the civil case is pending and failure to do so was jurisdictionally improper.

On August 9, 1994 the Honorable Russell G. Clark, Senior Judge, United States District Court, Western District, Southern Division rendered his decision granting Respondent's motion without qualification or modification. As regards District Court jurisdiction, the Respondent cited Fed. R. of Crim. Pro. 6(3)(3)(C) and (D). 28 U.S.C. §§ 1361 and 1331, though applicable, were not cited by Respondent. Pursuant to Petitioner's Motion to

Stay the Court's Order of August 9, 1994, on August 19, 1994 Judge Clark granted said motion.

On or about September 2, 1994 Petitioner filed its notice of appeal to the United States Court of Appeals, Eighth Circuit. Hereafter, WILLIAM ROUSSIN is referred to as Petitioner. The Eighth Circuit Court of Appeals jurisdiction is pursuant to 28 U.S.C. § 1291 and Fed. Rules of Appellate Pro. 3 and 4. On appeal, Petitioner again asserted the federal questions (1) through (8) as listed above regarding the District Court.

Before the District Court and the Court of Appeals there was no testimony and therefore there is no transcript of proceedings. The District Court and the Court of Appeals ruled after consideration of motions and supporting memorandums filed by the parties supporting their respective positions.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

1. THE GRAND JURY MATERIALS AND INFORMATION SOUGHT BY RESPONDENT CONSTITUTE "MATTERS OCCURRING BEFORE THE GRAND JURY" PURSUANT TO RULE 6(e) FEDERAL RULES OF CRIMINAL PROCEDURE AND CASE LAW, ESPECIALLY *U.S. V. ARMCO STEEL CORP.*, 458 F.SUPP. 784 (1978)

The leading case is *U.S. v. Armco Steel Corp.*, 458 F.Supp. 784, a 1978 case. In addition, *U.S. v. Armco* was decided by the United States District Court, Western District of Missouri (Kansas City, MO) and was affirmed by

the 8th Circuit Court of Appeals. In *U.S. v. Armco*, supra, the exact question of whether memorandums and documentation subpoenaed and prepared prior to Grand Jury proceedings could be unsealed as an exception to Rule 6(e) was addressed. The Court's answer was a definitive no. The fact that Respondent is not seeking transcripts is irrelevant. The Court stated, " . . . The Court has concluded on the merits that the *memoranda* in question constitute grand jury materials (emphasis provided). Rule 6(e), Federal Rules of Criminal Procedure is phrased in terms of ' . . . matters occurring before the grand jury . . . ' Thus, by the terms of the rule, the secrecy is not limited to transcripts but encompasses *anything* that might tend to reveal what transpired in the grand jury room." (emphasis provided). *U.S. v. Armco Steel Corp.*, supra at 789. The Court went on to state, "Accordingly, it is not significant that the government memoranda were prepared prior to the grand jury proceedings, rather than after . . . In both instances, Rule 6(e), Fed. R. Crim. Pro. must be applied because disclosure of the document would tend to disclose what transpired before the grand jury." Supra at 790. At n. 20, p. 790 supra, the Court also stated, "Applying the policy of secrecy to the interview memoranda in question is consistent with this consideration of encouraging witnesses to come forward and to speak freely and candidly."

The cases cited by the Respondent in the lower courts are inapplicable and do not overturn *U.S. v. Armco*, supra. Most of those cases cited by Respondent predate *U.S. v. Armco*. For instance, Respondent cited *U.S. v. Interstate Dress Carriers, Inc.*, 280 F.2d 52 (2d. Cir. 1960) for support of its request. However, in that case, the ICC had the

authority via § 320(d) of the Motor Carrier Act to inspect the appellant's records and as the Court stated " . . . The inspection will not impinge upon the secrecy of the grand jury proceedings." *U.S. v. Interstate Dress Carriers, Inc.*, supra at 54. Respondent also cited *U.S. v. Phillips*, 843 F.2d 438 (11th Cir. 1988) in an attempt to bolster its argument. However, in the *Phillips* case, "The subpoenaed documents were never seen by the grand jury." *U.S. v. Phillips*, supra at 441. In the case before this Court, presently, the majority of the requested documents were seen by the grand jury or said documents were testified to and/or about.

In re Matter of Special March 1982 Grand Jury, 753 F.2d 575 (7th Cir. 1985) also supports Petitioner's position. *U.S. v. Armco Steel Corp.*, supra has already determined that prosecutorial memoranda constitutes protected Rule 6(e) "matters occurring before the grand jury." The information the Respondent seeks constitutes information involving the "Second Injury Fund Scandal" as it has become known. The Affidavit of Assistant U.S. Attorney JAMES MARTIN filed in the Eastern District of Missouri states without condition that the investigation is "ongoing". How then would release of this information "not seriously compromise the secrecy of the Eastern District grand jury's deliberations." *In re Matter of Special March 1992 Grand Jury*, supra at 578. If it does, said this Court, it cannot be released. Petitioner suggests that it is further incomprehensible how Assistant U.S. Attorneys Martin and Jones are so willing to turn loose confidential information presented to a grand jury that contains prospective indictees while the investigation is ongoing. In many of the cases cited by the Respondent, the U.S. Attorney

sought to restrict access to grand jury documentation and memoranda. Mr. Martin and Mr. Jones appear to have adopted a liberal view at odds with the case law. Additionally, even though the U.S. Attorney has apparently informed the Court by sealed document that the Western District Grand Jury investigation is concluded, the Eastern District investigation is not. The documents requested relate to both investigations, one of which is still ongoing, thus compromising secrecy.

Also, on this point, the issue of accountability arises. Prosecutorial notes and memoranda may be highly inflammatory containing inaccurate information and undoubtedly less than objective opinions. To elevate the opinions of the Assistant U.S. Attorney to evidence is to give credence to the opinions of simply another lawyer, no more elevated than anyone else and to admit hearsay evidence. Also, how is Petitioner to determine the authenticity of notes, documents and memoranda or the age of the same. Such circumstances give rise to possible abuse or at least the impression of the same. Respondent's case in chief is highly speculative. J. Stohr so stated in his order denying attachment. (Appendix, p. 140). In *In Re Special February 1975 Grand Jury*, 652 F.2d 1302 (CA 7 Ill. 1981) the Court stated, "Disclosure is not warranted where present Internal Revenue Service civil investigation of defendant's possible additional tax liabilities is too embryonic, speculative and uncertain to firmly say that it is preliminary to judicial proceeding." Respondent has acknowledged to the District Court that it seeks this information because its suit is speculative and unspecific.

Ultimately, Respondent seeks this information to discover the basis of the criminal prosecutions and the probable cause for the true bills. Petitioner pled guilty so the information is irrelevant as to probable cause. "Once the Grand Jury returns a true bill, generally no independent inquiry may be made to determine the kind of evidence it considered in determination that probable cause existed." *Hickman v. Vally Local School Dist. Bd. of Ed.*, 513 F.Supp. 659 (SD Ohio 1981).

The lower courts made no order for an in camera review of the documents to determine "what occurred before the Grand Jury". Consequently, the District Court was speculating. Neither Respondent nor the District Court as sustained by the Court of Appeals afforded any opportunity (through notification) to the "witnesses" to object to their Grand Jury testimony being disclosed. This opportunity to object should have been given. *Illinois v. Sarbaugh*, 552 F.2d 768 (7th Cir. 1977). See also *In re Special February 1971 Grand Jury v. Conlisk*, 490 F.2d 894 (7th Cir. 1973) and *In re Holovachka*, 317 F.2d 834 (7th Cir. 1963).

The District Court below ordered disclosure of Western District grand jury information for use in another District (Eastern District where the civil case is pending). The Court in *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211 (1979) clearly stated that this was improper since the judge would have insufficient knowledge of the proceeding in the other District to make a determination of the need for disclosure. Such is precisely the case here.

The District Court as affirmed by the Court of Appeals violated Rule 6(e)(3)(E) in failing to transfer the Respondent's request to the U.S. District Court, Eastern

District of Missouri where the civil case is pending since the Western District Court took no steps and gave no notice of such to illustrate it had obtained sufficient knowledge of the civil case to determine whether disclosure was proper.

Finally, the Court gave considerable weight to AUSA Jones "opinion" that "disclosure of the requested documents would not reveal the inner workings of the grand jury." This was a determination for the Court, not Mr. Jones. His opinion is irrelevant and improper and should not have been considered. The District Court not only considered it, but listed it as authority for its decision.

Finally, Respondent, below, cited *In Re Grand Jury Proceedings Relative to Perl*, 838 F.2d 304 (8th Cir. 1988) as the cornerstone of its position that Rule 6(e) in this matter was complied. However, *Perl* does not overrule *Armco*. *Perl* simply held that a party seeking disclosure of grand jury materials *generated independently* of a grand jury investigation must show particularized need. Here, the grand jury documents were not generated independently of the grand jury investigation but rather as a result of it. The Court in *Perl* sought to expand Rule 6(e) protection by stating, "While the disclosure of documents created independently of the grand jury investigation is less likely to impinge upon the policy underlying grand jury secrecy, the disclosure of these documents reveals at the very least, the direction of the grand jury's investigation and the names of persons and thus falls within Rule 6(e)(2)." *Perl*, supra at 307. Consequently, the standard for Rule 6(e) review in *Armco* and *Perl* is the same. The difference is only in the result and that cases were dealing with different sources of information. In *Armco*, the

"grand jury investigation generated documents" (as in this case) were found to "occur before the grand jury" and were thus prohibited. In *Perl*, the "documents created independent of the grand jury" and then submitted to the grand jury were held to be disclosable because a showing of particularized need had been made. And, unlike the *Armco* (and here) grand jury generated investigation documents, the *Perl* independently created documents were subject to a lesser showing of particularized need because when dealing with these "independent documents" the parties seeking disclosure "should not be required to demonstrate a large compelling need." *Perl*, supra at 307. All documents sought in this case by Respondent are *Armco* type grand jury generated investigation documents.

It does not matter whether the documents were prepared before, after or during the grand jury investigation or whether they were independently generated and presented to the grand jury or generated from the grand jury. The issue is whether their disclosure will violate grand jury secrecy. *Armco*, supra at 789-790 states, "Thus, by terms of the rule, the secrecy is not limited to transcripts but encompasses anything that *might tend to reveal* what transpired in the grand jury room. Accordingly, it is not significant that the government memoranda were prepared prior to the grand jury proceedings rather than after . . . In both instances, Rule 6(e) Federal Rules of Criminal Procedure must be applied because disclosure of the document would tend to disclose what transpired before the grand jury." (emphasis provided)

Even if this Court determines that there is a "diminished secrecy" aspect to this case because of press coverage, diminished secrecy is not a valid legal basis for access. The State's civil lawsuit is replete with references throughout to unnamed/unidentified co-conspirators. They are referred to as "club contributors", "other attorneys", and "Special Assistant Attorney Generals", etc. Disclosure of information involving named defendants will disclose the identification of these persons even though they have not had an opportunity heretofore to respond. Consequently, when the Eighth Circuit stated on page 7 of its decision, "The civil case has already made public the alleged involvement of the defendants who were not indicted", this was incorrect. The civil complaint refers to numerous indictable persons who were not indicted or sued in the civil case. These persons' names have not yet been disclosed in the lawsuit. Access to grand jury information will make them public.

2. THE RESPONDENT MADE NO SHOWING OF "PARTICULARIZED NEED" NOR DID RESPONDENT SPECIFY THE NATURE OF ITS "PARTICULARIZED NEED" FOR JUSTIFICATION OF DISCLOSURE OF THE GRAND JURY INFORMATION

In its Motion and supporting memorandum before the District Court, Respondent failed to identify or specify the nature of its "particularized need". In general, Respondent said nothing on this point other than the Grand Jury information would be useful. The Court stated in *In Re Grand Jury, etc.*, (1979 ND.W.Va) 82 FRD 70 "The requirement of a showing of particularized

need . . . was not met by a mere *showing* that testimony contained in the transcript was *relevant* and *useful* in the civil action." (emphasis provided) Respondent made no *showing* of anything to the District Court regarding particularized need.

Respondent also stated in its Motion to the District Court that U.S. Government agency officers gathered much of the information sought and therefore it is essential to the Respondent to obtain this information because of these agents familiarity with the subject matter. This very argument was rejected in *In Re Miami Federal Grand Jury No. 79-8*, 478 F.Supp. 490 (1979 SD Fla).

Respondent virtually admitted to the District Court that its Complaint in the case in chief was fatally defective for lack of specificity and speculation. On p. 2 of its Memorandum filed in the District Court, Respondent stated:

> "Disclosure and access are sought to enable the State to *evaluate* the pertinent facts and circumstances of this matter, to *determine* the alleged civil liability of various individuals and entities and to accurately *identify* both the *extent* of its damages and the potential *liability* of the scheme's participants." (emphasis provided)

In other words, Respondent needs to determine if there is liability and to identify damages. The above should have been determined *before* a suit was filed. In any event, by admission, it is clear that Respondent's lawsuit is pure speculation. How can Respondent illustrate "need" when it doesn't even know whether liability lies and whether there are damages – in short, whether there is a lawsuit. Seeking Grand Jury information to

determine if a lawsuit is warranted is very different from seeking to attempt to legitimatize an already filed cause of action. See *Senate of Commonwealth of Puerto Rico on Behalf of Judiciary Committee v. U.S. Dept. of Justice,* 825 F.2d 574 (1987 App. DC) and *U.S. v. Beatty,* 587 F.Supp. 1325 (1984 ED NY) and *U.S. v. John Doe,* 481 U.S. 102 (1987).

The Respondent acknowledged in the District Court that it could obtain the information through normal means but suggested it was seeking in this manner because 1. The State lacks the resources; 2. Its easier this way; 3. The information is unavailable from other sources.

1. *The State lacks the resources.* Petitioner is self-represented. The decision of self representation is financial. The State has six (6) lawyers working on this case full time and all the resources of the Attorney General's Office at their disposal, not to mention paralegals, computers and secretarial all paid for at taxpayers expenses. This argument is ridiculous.

2. *Its easier this way.* Even if this is true, which has not been established, it certainly does not eliminate the protections and requirements of Rule 6(e).

3. *The information is unavailable from other sources.* Respondent has presented no evidence, affidavits, documentation or information to this Court to establish the unavailability of this grand jury documentation, whatever it is from other sources. It has completely failed to establish unavailability of information and thereby particularized need.

The case of *United States v. Dynavac, Inc.*, 6 F.3d 1407 (9th Cir. 1993) supra supports Petitioner's position. The Court allowed disclosure of the documents in that case because 1) the special agents report (SAR) was purged from the documents; 2) the IRS has specific statutory authority to assess civil tax liabilities; 3) the records and documents in question were not being subpoenaed from the U.S. Attorney but directly from the business involved and 4) the documents were prepared in advance of the Grand Jury by the business (not by the government) and not for or in anticipation of the Grand Jury. *U.S. v. Dynavac, Inc.*, supra at 1413. *Dynavac* went on to state that disclosure can be considered when the request is for business records created for purposes "independent" of grand jury investigations, which have legitimate uses unrelated to the substance of the grand jury proceedings. *Dynavac*, supra at 1412. All the information sought herein was created solely for and by the grand jury for grand jury purposes.

The Court in *Dynavac* also stated that the test for Rule 6(e) application varies somewhat from jurisdiction to jurisdiction. The three approaches are the 1) per se rule (all grand jury documents are always protected from disclosure under Rule 6(e)), *U.S. v. Dynavac*, supra at 1412; 2) the effect or case by case test (whenever disclosure of a particular requested item will reveal some secret aspect of the inner workups of the grand jury), *U.S. v. Dynavac*, supra at 1412; and 3) the rebuttable presumption test (which presumes that documents are matters occurring before the grand jury but permits the moving party to rebut that presumption by showing that the information is public, not obtained by coercion and that

the nature, scope or direction of the grand jury inquiry would not be disclosed), see *U.S. v. Dynavac*, supra at 1413. The Respondent cannot prevail on any of the three approaches as it cannot meet its burden under any of the above. The three approaches *all* emphasize grand jury secrecy. It has not shown or alleged below that disclosure will not reveal the Grand Juries inner workings and it has not rebutted the secrecy presumption. As stated in *U.S. v. Dynavac*, supra at 1410, "When government attorneys seek grand jury information for use in related civil proceedings, the concerns are that disclosure will increase the risk of inadvertent or illegal further release of the information to unauthorized persons, the integrity of the grand jury process itself will be compromised, and possible subversion of the limits otherwise placed on the government's investigation and discovery powers in the civil context." (emphasis provided). It should be noted the Court required only "possible" subversion, not probable or likely.

The Respondent further failed to indicate unambiguously what portions of grand jury information would be relevant or how it would be relevant to the civil action. The District Court's "cost saving" decision as affirmed by the Court of Appeals exhibits the fact that the District Court misinterpreted the law. The Court in *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211 (1979) held that a movant seeking grand jury information must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding (which Respondent neither alleged nor established); that the need for disclosure is greater than the need for continued secrecy (neither alleged nor established); and that the request is

structured to cover only material so needed (no such specification was given by Respondent – in actuality Respondent's request emphasized the "any and all" language approach). See also *Illinois v. Abbot & Assocs., Inc.*, 460 U.S. 557. The fact that a Grand Jury (here, the Western District) has dissolved is irrelevant (see *Douglas Oil Co.*, supra at 217). The proper method for the Western District would have been to forward the requests and its evaluation on the need for continued secrecy to the Eastern District where the civil case is pending, (See *Douglas Oil Co.*, supra at 230-231) so that the Eastern District could make the determination as mandated by the aforementioned case law.

Nowhere does the Court specify or describe what facts were presented at the District Court level by Respondent to establish *in this case* a showing of particularized need or showing that these matters are an exception to Rule 6(e) protection. See *U.S. v. Armco Steel Corporation*, 458 F.Supp. 784 (1978); *In Re: Grand Jury, etc.*, (1979 N.D.W.Va.) FRD 70; *Miami Federal Grand Jury*, 478 F.Supp. 490 (S.D.Fla. 1979). Absent unauthorized ex parte communications with the U.S. Attorney's Office, how can appellee know anything about the content of this information? What documentation, affidavits or proof has the Respondent presented to the District Court to "show" that through efforts, other than accumulation of grand jury information by disclosure, it cannot obtain documentation or information to "determine civil liability, extent of damages, or the identity of other alleged participants? The answer is none and additionally, Petitioner has asserted that Respondent is well aware of other alleged

participants and refuses to include them for political reasons.

It is clear that grand jury information is that which is created or accumulated via a grand jury investigation. The authorship is not determinative of this. Additionally, Respondent's request for information asks for documentation which was either created or accumulated by the grand jury investigation. Requests 1-5 all fall into this category. Request 2, 4 and 5 constitute information "created" by the grand jury investigation. Request 1 relates to information accumulated which is therefore also accessible from its original source or recipient. Request 3 contains information both accumulated and created by the grand jury investigation. All of the above disclose the inner workings of the grand jury. Even by Respondent's logic and reasoning, Requests 2 through 5 fail as documents created by the grand jury investigation. See *U.S. v. Dynavac, Inc.*, 6 F.3d 1407 (9th Cir. 1993).

Respondent below cited *U.S. v. John Doe*, 481 U.S. 102, 95 L.Ed.2d 94 (1987) to combat Petitioner's assertion that the District Court was speculating as to the public interest and that alternative discovery avenues were available and as yet unreviewed by the Respondent. In the *John Doe* case, the information was being released from one Justice Department attorney to another and thus posed less risk of leakage or improper use than would disclosure to private parties or the general public. See *John Doe*, supra at L.Ed.2d 107-108. In *John Doe*, it was held that grand jury information, upon an adequate showing of particularized need, could be shared by federal government attorneys in the criminal and civil divisions for purposes of determining *whether* a civil action should be initiated.

That is not the situation presently before this Court. The Court in *John Doe*, supra at L.Ed.2d 108 stated, " . . . the Court could take into account any alternative discovery tools available by statute or regulation . . . " In this case, the District Court, as affirmed by the Court of Appeals, made no such consideration of alternative discovery tools.

Finally, Respondent asserted below that the District Court had "substantial discretion" regarding its determination. However, this is not an unbridled roving commission. In *Perl*, the Court stated that the District Court " . . . must weigh *carefully* the competing interests in light of the relevant circumstances and the standards." *Perl*, supra at 306 (emphasis provided). What competing interests did the District Court weigh? What interests, other than cost savings did the District Court consider? The *Perl* Court went on to state that the District Court's decision is to be reversed if its " . . . discretion has been abused." *Perl*, supra at 306. As stated in *Matter of Disclosure of Testimony, etc.*, 580 F.2d 281, 286 (1978), "Even when the literal requirements of Rule 6(e) are met, a court must *carefully* balance the interests of grand jury secrecy against the goal of a just result in a judicial proceeding." The indispensable secrecy must not be broken *except* where there is a *compelling necessity*." *In re Matter of Disclosure of Testimony, etc.*, supra at 286 citing *U.S. v. Proctor and Gamble Co.*, 356 U.S. at 677, 682 (1958) (emphasis provided). Certainly, there was nothing that approached a "compelling necessity" presented to the District Court to justify disclosure.

3. IT WAS IMPROPER FOR THE DISTRICT COURT AS AFFIRMED BY THE COURT OF APPEALS TO RECEIVE AND CONSIDER THE "SEALED" LETTER STATEMENT OF AUSA DAVID JONES FOR THE REASON THAT SAID STATEMENT CONSTITUTED INADMISSABLE HEARSAY AND RECEIPT AND CONSIDERATION OF THE SAME VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS PURSUANT TO THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION AND THE DISTRICT COURT GAVE DISPROPORTIONATE WEIGHT TO SAID STATEMENT

The District Court, after deferring a ruling on the Respondent's access motion for months, ruled for Respondent on August 8, 1994, the same day the Court received the letter statement of AUSA Jones. To this date, Petitioner has never seen said letter, has no knowledge of its contents, assertions or allegations and consequently has never had an opportunity to challenge the same.

Apparently, from the District Court's Order, AUSA Jones informed the Court that *he* felt the information should be disclosable and informed the Court what *he* thought the information showed. Setting aside the fact that Mr. Jones' opinions hold no more weight than anyone elses (see *Huber v. United States*, 838 F.2d 398 (CA9 Cal. 1988)), the receipt of this letter by the Court allowed hearsay to be admitted and to apparently influence the District Court's decision. Hearsay is evidence of a statement which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated. See *State v. Shaw*, 847 S.W.2d 768 (Mo.App.). The letter statement of Mr. Jones clearly meets both criteria.

Additionally, this hearsay statement is not even relevant. The statement is nothing more than one man's opinion or conclusion who has not been qualified as an expert. Irrelevant evidence denotes evidence that does not logically tend to prove or disprove any material fact or proposition. See *Hansson v. Catalytic Construction Co.*, 127 A.2d 431 (N.J. Super 23). AUSA Jones "opinions" neither prove nor tend to prove anything.

Because no hearing was allowed and the Jones' statement was (and is) sealed, Petitioner was precluded from challenging the statement and/or cross-examining Mr. Jones on it. The right to confront and cross-examine witnesses is a fundamental aspect of procedural due process and such right applies not only in criminal proceedings but also in non-criminal proceedings, including administrative or quasi-judicial proceedings. See *Wolf v. McDonnell*, 418 U.S. 539, 41 L. Ed. 2d 935 and 81 AM JUR 2d WITNESSES § 464. "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 25 L. Ed. 2d 287.

It is clear that the District Court went even further in violating Petitioner's due process in that the Court allowed Mr. Jones to render a secret personal opinion on the law, i.e., relevancy of the grand jury information. "Due process is absent if a party is denied an opportunity to cross-examine those whose evidence is given against him." *Collins v. Superior Court of L.A. County*, 150 Cal.App.2d 354, 310 P.2d 103. Although the letter should never have been received, the Court should have at least unsealed it and submitted it to Petitioner for review and

possible cross-exam or challenge via a Motion to Strike, etc.

This Court has received a clear indication of the position of Missouri State Court's on this issue. In *Fullock v. St. Charles*, 602 S.W.2d 860 (Mo.App. 1980) the Court stated "A police officer is denied a fair hearing and due process where members of the disciplinary board have read a report which contains material adverse to the police officer and deny him opportunity to *see the report and rebut material therein.* (emphasis provided) See also *Fairbanks v. Alaska Public Utilities Com.*, 611 P.2d 493 (Alaska 1980) regarding tribunals review of information regarding one opponent made confidential and not disclosed to opposing party.

This is a 5th Amendment due process issue. *Wolf v. McDonnell*, 418 U.S. 539 (1974) states that this right applies to criminal, civil, administrative and quasi-judicial proceedings.

Respondent also asserted that the hearsay statement of AUSA Jones was "indispensable". Whether it is or is not is irrelevant. Indispensability is not an exception to the hearsay rule.

The district court's only reason for disposing of the Rule 6(e) issue in favor of the Respondent was based on the termination of the grand jury. The district court then went on to give as its ultimate rationale for granting the Respondent's request the "cost-savings" approach. This is an over-simplified approach by the district court and does not follow or apply the appropriate legal standards.

The Court in *In Re Grand Jury Proceedings Relative to Perl*, 838 F.2d (8th Cir. 1988) stated that the district court " . . . must weigh *carefully* the competing interests in light of the relevant circumstances and the standards." *Perl*, supra at 306 (emphasis provided). What competing interests did the district court weigh? What interests, other than cost savings did the district court consider? The *Perl* Court went on to state that the district court's decision is to be reversed if its " . . . discretion has been abused." *Perl*, supra at 306. As stated in *Matter of Disclosure of Testimony, etc.*, 580 F.2d 281, 286 (1978), "Even when the literal requirements of Rule 6(e) are met, a court must *carefully* balance the interests of grand jury secrecy against the goal of a just result in a judicial proceeding." The indispensable secrecy must not be broken except where there is a *"compelling necessity." In re Matter of Disclosure of Testimony, etc.*, supra at 286 citing *U.S. v. Proctor and Gamble Co.*, 356 U.S. at 677, 682 (1958) (emphasis provided). Certainly, there was nothing that approached a "compelling necessity" presented to the district court to justify disclosure.

4. THE DISTRICT COURT FAILED TO INDICATE HOW OR IN WHAT MANNER THE RESPONDENT MADE A SHOWING OF "PARTICULARIZED NEED" AND BASED ITS 08/09/94 ORDER SOLELY ON A "COST SAVINGS" RATIONALE WHICH IS AN IMPROPER BASIS FOR RULING AND DOES NOT ADDRESS HOW THE INFORMATION REQUESTED IS NOT "MATTERS OCCURRING BEFORE THE GRAND JURY" OR HOW THE RESPONDENT HAS SHOWN PARTICULARIZED NEED

The Respondent never established what its "particularized need" constituted. The District Court's Order as

affirmed by the Court of Appeals sheds no light upon what "particularized need" was shown. Nowhere did the Court attempt to set forth what the "particularized need" constitutes. It simply says, "The State has shown a particularized need for disclosure of documents". It then immediately thereafter states there would be a cost savings. The District Court then goes even further and without having reviewed the information requested in Respondent's motion states unconditionally, "It is apparent that these documents would assist the State in information needed to prepare the case for trial pending in the Eastern District." How did the District Court know this? This is pure speculation. The District Court goes on to state that disclosure " . . . would be in the public interest . . . " Since the District Court already stated that the documents (unseen by the District Court) would assist the State (Respondent) to prepare its case for trial, the Court is obviously stating that it is in the public interest to assist the State in preparation of its case. How does the District Court know this? Knowing nothing about the grand jury information or the pending civil case, how can the District Court determine that the public interest is served by pursuit of this case? Is it not equally possible that the Respondent's suit is frivolous, meritless and/or politically motivated and dismissal of the suit would be in the "public interest". Either way, the District Court by failing to review the grand jury documents had no way of knowing.

The District Court's lack of any rationale for its decision illustrates that its only motivation was "cost savings" and a pre-ordained and unsubstantiated opinion that the Respondent's civil suit is in the public interest.

See *U.S. v. Armco Steel Corp.*, 458 F.Supp. 784 (1978); *In re Grand Jury, etc.*, (1979 N.D.W.Va.) 82 FRD 70; *Miami Federal Grand Jury No. 79-8*, 478 F.Supp. 490 (S.D.Fla.) 1979.

The case of *U.S. v. John Doe, Inc.*, 481 U.S. 102 (1987) is applicable herein. The *Doe* Court held that where disclosure is sought to determine *if* a civil suit lies before the filing of the same, the contemplated use may serve to be cost saving because the Respondent may decide *not* to file suit. See *Doe*, supra at 95 L.Ed.2d 108 (emphasis provided). The *Doe* Court's cost saving analysis relates to looking first and possibly filing later. Here, the State filed first and now seeks to look. The "looking" will result in disclosure of grand jury secrecy. The *Doe* Court made two other extremely relevant holdings. It stated, "Finally, because the disclosure authorized in this case would not directly result in any witnesses testimony being used against him or her in a civil proceeding, there is little fear that the disclosure will have any affect on future grand jury testimony. Supra at 95 L.Ed.2d 109. The opposite is the case here as the Respondent seeks to sue this information at an adversarial proceeding. Also, "Of course, when the government requests disclosure for use in an actual adversarial proceeding, this . . . may require a stronger showing of necessity." Supra at 95 L.Ed.2d 110. Such is precisely the case here.

5. THAT THE COURT, IN FAILING TO GRANT PETITIONER A HEARING AS REQUESTED BY PETITIONER VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS PURSUANT TO THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION AND RULE 6(e)(3)(D) FEDERAL RULES OF CRIMINAL PROCEDURE

By virtue of the lower court's denial of Petitioner's request for a hearing, not only was Respondent relieved from proving its assertions in Court, but Petitioner was denied the right to confront and cross-examine adverse witnesses. See *Fullock v. St. Charles*, 602 S.W.2d 860 (Mo.App.), *Wolf v. McDonnell*, 418 U.S. 539 and *Goldberg v. Kelly*, 397 U.S. 254.

Petitioner requested a hearing by motion pursuant to Fed.R.Crim.P. 6(e)(3)(C) and (D) subsequent to receipt of Respondent's Motion for Access, etc. Since this matter was not handled by the Court ex parte, the Court, per Rule 6(e)(3)(D) "*shall* afford those persons a reasonable opportunity to *appear* and be *heard*." (emphasis provided) Failure to grant this right resulted not only in violation of Rule 6(e)(3)(D) but also Petitioner's due process rights. The Petitioner was precluded from subpoenaing and examining in open Court AUSA David Jones to determine, amongst other things, what or how much communication regarding grand jury information took place prior to the District Court's ruling.

6. THAT THE DISTRICT COURT'S ORDER OF AUGUST 8, 1994 AS AFFIRMED BY THE COURT OF APPEALS GRANTING RESPONDENT'S MOTION FOR ACCESS WAS AGAINST THE WEIGHT OF THE LAW FOR THE REASON THAT RESPONDENT'S MOTION WAS FATALLY DEFECTIVE FOR THE REASON THAT SAID RESPONDENT FAILED TO COMPLY WITH THE THRESHOLD SIX (6) CONDITION TEST SET FORTH IN *U.S. V. ARMCO STEEL CORP.*, 458 F.SUPP. 784 (1978)

Respondent's "Rule 6(e) Petition" in requesting grand jury information, failed to meet and comply with the initial threshold six condition test set forth in *U.S. v. Armco Steel Corp.*, 458 F.Supp. 784, 786 (1978) which states:

> (1) A motion should be filed with the Court in Western Missouri requesting that the documents in question be unsealed;
>
> (2) A request should be made by the Plaintiff (here, Respondent State of Missouri) that the Court establish a custodian for the memoranda with adequate precautions so that only counsel and named parties to the litigation can inspect the memoranda, preferably in the clerk's office or other secure location;
>
> (3) No copies of the memoranda should be made or circulated aside from those in the possession of the Court's custodian;
>
> (4) All parties and counsel should be prohibited from disclosing the identity of the individuals interviewed to any person who is

not a party to the litigation or in circumstances not directly related to proceedings ancillary to the litigation;

(5) Each person interviewed must be advised in writing of the fact that you intend to seek these memoranda concerning their interviews and they must be provided a reasonable opportunity to interpose any objection they may have to their disclosure, and;

(6) The Court be provided with a copy of the letter stating Plaintiff's views.

In particular, numbers (2) - (6) have not been done. No custodian has been requested or appointed (2); no request or order regarding circulation of copies has been made (3); no request or order for a prohibitive statement by the Court has been made (4); certainly interviewees were not contacted and advised of their right to object to disclosure (5); and the Court, to Petitioner's knowledge never received a letter setting forth Respondent's views (6).

The requested information includes "interview notes of witnesses, summaries and affidavits" but purportedly excludes "notes or summaries regarding witness testimony before the grand jury." Since the District Court has given no direction as to what is and is not relevant and since it has chosen not to make an in camera inspection of these documents, who, then, is to distinguish. For example, if witness A gave an interview in August and then gave another in November and testified to the grand jury thereafter, which notes, summaries or affidavits are disclosable? Is either set disclosable? What safeguard has

Petitioner if this decision is left to the Respondent and the Assistant U.S. Attorneys, as it has been so left by the District Court?

The District Court and Court of Appeals have literally ruled on something of which they have no knowledge. Without an in camera review of the grand jury information or a working knowledge of the civil suit pending in another District Court, the District Court's Order is nothing more than a carte blanche to the Respondent and gives no direction or limits as to disclosure and thereby provides no protection to Petitioner, grand jury witnesses or the grand jury itself.

7. THAT THE COURT OF APPEALS INCORRECTLY RULED ON THE ISSUE OF WHETHER THE U.S. DISTRICT COURT, WESTERN DISTRICT OF MISSOURI SHOULD HAVE TRANSFERRED PETITIONER'S REQUEST TO THE U.S. DISTRICT COURT, EASTERN DISTRICT OF MISSOURI WHERE THE CIVIL ACTION WAS PENDING

In *Douglas Oil Co. v. Petrol Shops Northwest*, 441 U.S. 211, 226 60 L.Ed.2d 156 (1979) the request for grand jury disclosure was directed to a jurisdiction where the civil case was pending, as here. The Court stated that the District Court, where the grand jury information request was filed should have transferred it to the district where the civil case was pending for determination. *Douglas Oil*, supra at 230-231. The civil case here is in the Eastern District of Missouri while the request is in the Western District. The civil case involves the alleged "Second Injury Fund scandal" which includes claimant's attorneys, defense attorneys, and administrative law judges.

The grand jury investigation in the Western District only involved William Webster, his land deals and the misuse of his office as a campaign tool. *Douglas Oil* illustrates that that Court was not stating that an Assistant U.S. Attorney's hearsay statements from a different jurisdiction should be admitted. Rather, the entire request should be transferred to the jurisdiction wherein the civil case is pending since the Court and U.S. Attorney personnel in that jurisdiction would be more familiar with the "subject of the request."

Rule 6(e)(3)(E) reads in whole as follows:

> "If the judicial proceeding giving rise to the petition is in a federal district court in another district, the Court shall transfer the matter to that Court unless it can reasonably obtain sufficient knowledge of the proceeding to determine whether disclosure is proper. *The Court shall order transmitted to the Court to which the matter is transferred the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand jury secrecy.* The Court to which the matter is transferred shall afford the aforementioned persons a reasonable opportunity to appear and be heard." (emphasis provided)

The rule clearly states and requires that the Court *shall* transfer unless it can obtain sufficient knowledge of the entire matter to make a determination. It also states, "The Court shall order transmitted to the Court to which the matter is transferred the material sought to be disclosed." It is clear that the District Court below did not review the grand jury information sought to be disclosed as evidenced by the Court's Order. Absent such a review, it is impossible for the District Court to have known

whether the grand jury information would be relevant to the civil case. Moreover, Rule 6(e)(3)(E) mandates such a review. It does not mandate that the district court defer its decision making powers to the opinion of the Assistant U.S. Attorney. Consequently, it is clear that the District Court and Court of Appeals deemed disclosable information they have never seen or reviewed. Having the State's "civil complaint" and the parties briefs before them was totally inadequate. There has been no showing or statement by the District Court or the Eighth Circuit Court of Appeals that either court has ever reviewed or looked at the grand jury documents in question.

CONCLUSION

For all the reasons stated, Petitioner, WILLIAM E. ROUSSIN, prays that this Court grant a Writ of Certiorari to review the decision of the United States Court of Appeals, Eighth Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

In re: Grand Jury Investigation

No. 94-3241

State of Missouri,
Plaintiff - Appellee,
v.
W. E. R.,
Defendant - Appellant.

No. 94-3242

State of Missouri,
Plaintiff - Appellee,
v.
R & R,
Defendant - Appellant.

Appeals from the United States District Court for the Western District of Missouri

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No. 94-3243

State of Missouri,
Plaintiff - Appellee,
v.
S. K. R.,
Defendant - Appellant.

Submitted: March 15, 1995

Filed: May 5, 1995

Before BEAM, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and MURPHY, Circuit Judge.

MURPHY, Circuit Judge.

These appeals arise from an order of the district court[1] granting a petition of the State of Missouri for access to certain material related to a grand jury investigation in the Western District of Missouri. The state petitioned under Federal Rule of Criminal Procedure 6(e)(3)(C)(i) for access to various documents and government agents to assist it in pursuing a civil action it brought in the Eastern District of Missouri. Appellants W.E.R., S.K.R., and R & R are defendants in the civil case, and they intervened in the district court to oppose the petition and to move for its dismissal. We affirm.

Grand jury materials are protected under the law, and their disclosure generally is not allowed, Fed. R. Crim. P. 6(e)(2), but certain exceptions exist. The district court found that disclosure here was appropriate as being "preliminarily to or in connection with a judicial proceeding." Fed. R. Crim. P. 6(e)(3)(C)(i).

In the pending civil case the state seeks to recover funds that were misappropriated from the Second Injury

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[1] The Honorable Russell G. Clark, Senior United States District Judge for the Western District of Missouri.

Fund, a state-administered worker's compensation fund. The state's complaint names thirteen defendants, including appellants, and has six claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*, and eleven claims under state law. One of the state law claims alleges that W.E.R. fraudulently transferred misappropriated funds to S.K.R., his wife. The state also claims that S.K.R. is liable to the state under partnership principles because she and W.E.R. allegedly practiced law together. The state claimed in its petition for access that the requested materials would aid in its determination of the liability of each of the civil defendants.

The materials sought are from a grand jury investigation which ended in August 1993 and which focused on a scheme in which supporters of the state attorney general received excessive settlement payments from the Second Injury Fund in return for contributions to his campaign. W.E.R. approached potential donors and arranged for payments to them. The attorney general waived indictment and pleaded guilty to an information, although he denied involvement in the fund scheme. W.E.R. and several other participants pleaded guilty to charge arising from the scheme.

The petition of the state specifically requested access to the following:

1. Any correspondence to or from the attorney general, W.E.R., and one other convicted participant regarding the Second Injury Fund or contributions to the state attorney general. This category also specifically

includes memoranda authored by a number of other individuals, including S.K.R.

2. Interview notes, summaries, and affidavits, with the exception of notes or summaries regarding witness testimony before the grand jury.

3. Notes, summaries, and charts regarding settlement payments made from the Second Injury Fund and contributions to the state attorney general, and the interrelationship between the two.

4. Records, lists, computer files, and reports regarding contributions to the state attorney general.

5. Reports of statistical information or actual case files obtained from the Missouri Division of Worker's Compensation, which administers the Second Injury Fund.

6. Access to the government agents who assisted in the grand jury investigation on condition that they not be asked about actual testimony before the grand jury.

The district court found that at least some of the materials requested by the state were "matters occurring before the grand jury" within the meaning of Rule 6(e)(2), but that they could be disclosed under Rule 6(e)(3)(C)(i).

The purpose of Rule 6(e)(2) is to protect the inner workings of the grand jury. The more a document reveals about that work, the greater the protection it receives under the rule. *See In re Grand Jury Proceedings Relative to Perl*, 838 F.2d 304, 306-07 (8th Cir. 1988). The materials sought by the state vary in their nature. For example, the

letters written by participants in the scheme were generated independently of the grand jury and therefore reveal little about its investigation other than that they were available to the grand jury which may have considered them; they are entitled to diminished protection under the rule. *Id.* at 307. Charts and summaries may reveal somewhat more about what the grand jury considered, but they were prepared by government attorneys or agents and were not the work product of the grand jury. The state is not requesting grand jury minutes or witness transcripts, which are entitled to the greatest protection under Rule 6(e). *Id.* at 306. The requested materials therefore fall along a spectrum and warrant different levels of protection, but none reveal much about the grand jury's inner workings.

A reduced showing of particularized need is required for documents which are entitled to lesser protection under the rule. *Perl,* 838 F.2d at 307. This requires a showing that the material is necessary to avoid "a possible injustice in another proceeding," that "the need for disclosure is greater than the need for continued secrecy," and that the disclosure request is tailored to include only necessary materials. *Douglas Oil Co. v. Petrol Stops Northwest,* 441 U.S. 211, 222 (1979). The decision to allow disclosure is entrusted to the substantial discretion of the district court, which must weigh the circumstances of each case. The district court will be reversed only if it has abused that discretion. *Id.* at 223.

Appellants argue that the state's showing of particularized need was inadequate and that the district court abused its discretion in allowing disclosure. They first contend that no injustice will result in the civil case if the

information is not disclosed, claiming that the district court incorrectly relied on cost savings as a rationale for disclosure. Cost savings can be a valid consideration, however. *See United States v. John Doe, Inc.*, 481 U.S. 102, 115-16 (1987). The district court also found that the materials are needed for the development of the civil case. The record indicates that access to the materials could aid substantially in the state's preparation of its case, not only saving time and money but also allowing more thorough discovery.[2] For example, the state contends that the grand jury is in possession of the only copies of some documents. One of the prosecutors who assisted in the grand jury investigation also testified by declaration that the requested materials would be beneficial to the state. This combination of factors is sufficient to show that disclosure is necessary to avoid possible injustice. *See Douglas Oil*, 441 U.S. at 222.

The second requirement of the *Douglas Oil* test is that the need for access must outweigh the interest in preserving the secrecy of the grand jury's inner workings. The district court found that the value of continued secrecy was minimal and that disclosure was in the public interest. Appellants argue that this was an abuse of discretion for several reasons. First, they contend that the district court improperly considered the fact that the grand jury had concluded its investigation in August 1993. The end

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[2] The State also suggests that it is concerned that some of the civil defendants who still face possible state criminal charges might invoke their right against self-incrimination and refuse to comply with discovery requests. At this point that concern is only speculation, however.

of a grand jury inquiry reduces the interests in grand jury secrecy, however. *In re Grand Jury Proceedings Relative to Perl*, 838 F.2d 304, 307 (8th Cir. 1988). Here, the grand jury concluded its work almost two years ago and issued a number of indictments. The state mentioned at oral argument that some grand jury materials, including transcripts, became public at the attorney general's eleven-day sentencing hearing. The interests in secrecy are reduced further by numerous media reports with details of the scheme and the names of its participants, including the defendants in the civil case. The need for continued secrecy is therefore minimal.

Consideration of the five reasons given by the Supreme Court in *Douglas Oil* for maintaining grand jury secrecy supports this conclusion. 441 U.S. at 219 n.10. Since the investigation is over, the grand jurors are no longer involved and cannot be influenced or intimidated. There is also no danger that the subjects of the grand jury inquiry will flee. Because the state has carefully excluded from its request any information regarding witnesses who actually testified before the grand jury, there is little reason to be concerned that disclosure might cause witnesses in this or future grand jury investigations to fear retribution. Finally, disclosure to the state poses relatively little danger to personal reputations. The grand jury has returned its indictments. The civil case has already made public the alleged involvement of the defendants who were not indicated. The grand jury materials can therefore do little but add specifics to already well known general allegations. The state's need for the grand jury materials outweighs the reduced importance of secrecy.

The appellants also argue that the state's request was not tailored to include only necessary materials. They argue that the district court should have imposed conditions of disclosure similar to those in *United States v. Armco Steel Corp.*, 458 F.Supp. 784 (W.D. Mo. 1978). In *Armco*, the Justice Department was willing to support disclosure if the civil plaintiffs seeking it would agree to a number of conditions, which they did. Federal officials here have not conditioned their support of disclosure, however, and the state's request is not overly broad. The state's petition appears limited to materials which are needed in the civil case. It explicitly avoided asking for information which would reveal actual testimony before the grand jury, such as witness notes and summaries. The enumerated requests also appear highly relevant to the state's articulated purpose of determining the liability of each defendant in the civil action.

Because the state demonstrated sufficient particularized need for the categories of requested materials, we find no abuse of discretion by the district court in granting the petition for access. Although the need for the requested materials is not as urgent as in some Rule 6(e) cases, the need for secrecy is greatly diminished. Disclosure here is consistent with the policies which underlie Rule 6(e).

Appellants raise several other arguments on appeal. First, they claim that the district court erred by not granting their motion for a hearing on the petition for access. Rule 6(e)(3)(D) requires that the parties to the proceeding for which grand jury materials are sought be given "a reasonable opportunity to appear and be heard." Fed. R. Crim. P. 6(e)(3)(D). Appellants contend that the district

court was therefore required to grant a hearing. The word "heard" does not warrant such a literal reading, however. All parties had the opportunity fully to brief the issues regarding access. Although a hearing may sometimes be necessary to explore the ramifications of granting access, appellants cite no authority holding that Rule 6(e)(3)(D) requires one under all circumstances. As with other issues under the rule, the decision to hold a hearing should be entrusted to the discretion of the district court. That discretion was not abused here.

Appellants also argue that they were denied due process because they did not have an opportunity to confront adverse witnesses, especially the Assistant United States Attorney who submitted a sealed declaration to the court on the propriety of disclosure. They also argue his declaration should not have been considered by the court; it was "irrelevant and improper."

Justice Department attorneys are not adverse witnesses in a traditional sense. Their duty is to protect grand jury secrecy where required. *See Illinois v. Sarbaugh*, 552 F.2d 768, 777 n.14 (7th Cir.), *cert. denied, J. L. Simmons Co. v. Illinois*, 434 U.S. 889 (1977). The fact that the prosecutor took a position contrary to that of the appellants does not transform his role into that of an adverse witness. The Supreme Court has acknowledged that such attorneys can play an important role in assessing the prudence of disclosure. *Douglas Oil*, 441 U.S. at 226. In exercising their judgment, they must necessarily consider sensitive information, including for example which materials were examined by the grand jury. Sealed submissions ensure that district courts receive full and frank

evaluations by the attorneys who participate in grand jury investigations.[3]

The appellants argue next that the state's petition should have been transferred to the Eastern District of Missouri where the civil action is pending. Rule 6(e)(3)(E) provides for transfer of a petition for access to the court where the ongoing judicial proceeding is located unless the court presented with the petition "can reasonably obtain sufficient knowledge of the proceeding to determine whether disclosure is proper." *See also Douglas Oil*, 441 U.S. at 230-31 (1979). The situation here is unlike that in *Douglas Oil* where transfer was appropriate. There the court in which a civil antitrust action was pending, rather than the court supervising the grand jury, was more likely to have noticed "important differences" between the allegations in the indictment and the "contours" of the cause of action in the civil case. *Id.* at 229. It is clear from the complaint in this case that the criminal and civil actions are closely related. The state is the victim under

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[3] Appellant's citation to *Wolff v. McDonnell*, 418 U.S. 539 (1974), is unpersuasive. They claim that *Wolff* supports their view that "[t]he right to confront and cross-examine witnesses is a fundamental aspect of procedural due process and such right applies not only in criminal proceedings but also in non-criminal proceedings, including administrative and quasi-judicial proceedings." Appellants Brief at 34. The holding in *Wolff* was that prison inmates did not have a right to cross-examine witnesses at disciplinary hearings because of institutional concerns regarding security. 418 U.S. at 567-69. Petitions for access to grand jury materials present analogous concerns. The need for candid assessments by Justice Department attorneys and for continued secrecy during the evaluation of the petition supports the use of sealed affidavits for this limited purpose.

both the criminal and civil theories, the elements of the causes of action are very similar, and the acts giving rise to criminal liability are the precise acts which will lead to civil liability if the state is successful. The parties informed the district court of the status of the civil litigation, and appellants filed several motions to dismiss similar to some pending in the Eastern District. We conclude that the district court had sufficient knowledge to determine whether disclosure of the requested materials was proper.

Appellants also appeal from the denial of their motions to dismiss the petition for access. They assert that the civil complaint was not pleaded with sufficient particularity under Federal Rule of Civil Procedure 9(b) and that the RICO claims are inadequate in several respects. The district court presiding over the civil action recently denied appellants' motions to dismiss the civil complaint based on the same grounds. *Missouri v. Roussin,* No. 4:93CV2633-DJS, slip. op. at 9, 20 (E.D.Mo. April 10, 1995). That action is ongoing, and the petition for access to grand jury materials is "in connection with [that] judicial proceeding." Fed. R. Crim. P. 6(e)(3)(C)(i). Appellants have not shown that the district court erred in denying their motions to dismiss the petition.

One issue raised in the motion to dismiss the petition for access warrants further discussion; that is the issue of standing. Appellants argue that the state was not injured and therefore does not have standing to bring the civil action, but even if it did, the state should not have brought the action in its own name. They argue that the state may therefore not petition for access and that the district court should have dismissed the petition.

In support of their claim that the state did not suffer an injury sufficient to confer standing, appellants cite two cases from the Seventh Circuit in which RICO actions brought by state governments were dismissed. *Dillon v. Combs*, 895 F.2d 1175 (7th Cir.1990); *People of State of Illinois v. Life of Mid-America Insurance Co.*, 805 F.2d 763 (7th Cir. 1986). *Dillon* and *Mid-America Insurance* were each brought by a state on behalf of its citizens who allegedly had been injured. *Dillon*, 895 F.2d at 177, *Mid-America Insurance*, 805 F.2d at 766. In this case, however, Missouri alleges direct injury to itself, not to its residents or consumers, because funds were misappropriated from a state-administered account. Where the state suffers harm, it may bring suit. *See Illinois Dept. of Revenue v. Phillips*, 771 F.2d 312, 315-17 (7th Cir. 1985); *cf., Sedima, S.P.R.L. v. Imrex Co., Inc.*, 105 S. Ct. 3275, 3285-87 (1985).

The statutory structure of the Second Injury Fund supports the conclusion that the state has standing to bring the civil action and is the real party in interest under Federal Rule of Civil Procedure 17(a). The Second Injury Fund is financed by a tax collected by the state. The state treasurer is the custodian of the fund, Mo. Rev. Stat. § 287.220.1, and the Division of Workers' Compensation administers it. Mo. Rev. Stat. §§ 287.220, 287.590. The state possessed the funds when they were misappropriated and was holding them for future disabled recipients. Because current and past Second Injury Fund recipients have received their compensation despite the alleged fraud, only the state was directly injured, and it can redress that wrong by replacing the funds if the suit is successful. The state therefore has standing.

Appellants contend that the civil action should have been brought in the name of the state Division of Workers' Compensation, or perhaps the state treasurer, rather than by the state itself. As appellants assert, the Second Injury Fund statute requires that all suits against the fund for benefits include the treasurer as a party, Mo. Rev. Stat. § 287.220.2, and the Division of Workers' Compensation may sue or be sued in its own name. Mo. Rev. Stat. § 287.590. The statute also provides, however, that if an employer does not have the required worker's compensation insurance, the "office of the attorney general of the state of Missouri shall bring suit." Mo. Rev. Stat. § 287.220.5. The statute does not specify that the attorney general must bring the action on behalf of the treasurer or any other office or department. *Id., see also* Mo. Rev. Stat. § 27.060. The situation in this case is comparable to a suit against an uninsured employer. Both involve the state pursuing a third party to recover expenditures from the Second Injury Fund that would not have been made had the third party complied with the law. No other provision of Missouri law limits the state's ability to bring this suit in its own name. The state is the real party in interest and has standing to petition for access.[4]

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[4] The district court presiding over the civil action recently denied the appellants' motions to dismiss that case for lack of standing. *Missouri v. Roussin*, No. 4:93CV2633-DJS, slip. op. at 19-20 (E.D.Mo. April 10, 1995).

Accordingly, for the reasons discussed, the order of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION

IN RE: GRAND JURY INVESTIGATION RELATIVE TO WILLIAM WEBSTER, et al.	)))))	No. 94-MC-9015

ORDER

(Filed Aug. 1, 1994)

On May 27, 1994 the State of Missouri filed a petition for disclosure of documents in possession of grand jury and for access to and use of grand jury agents and their work product. In the State's petition it is stated that the office of the United States Attorney for the Western District had been advised of the State's petition and it intended to file a response. As of this date the United States Attorney for the Western District of Missouri has not filed a response. It is

ORDERED that any response to the State's petition shall be fiied by the United States Attorney for the Western District of Missouri on or before August 12, 1994.

/s/ Russell G. Clark
RUSSELL G. CLARK,
SENIOR JUDGE
UNITED STATES
DISTRICT COURT

Date: August 1, 1994

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION

IN RE:	)	
GRAND JURY INVESTIGATION RELATIVE TO WILLIAM WEBSTER, et al.	)	No. 94-MC-9015

ORDER

(Filed Aug. 9, 1994)

The State of Missouri has filed a petition for disclosure of documents in possession of grand jury and for access to and use of grand jury agents and their work product.

William Landoff, William E. Roussin, Morris Kessler, John Kessler and Susan Roach have filed motions to intervene. Their motions will be granted. Susan K. Roach and William E. Roussin have moved to dismiss the State's petition. These motions will be denied. William E. Roussin, Susan K. Roach, Morris Kessler and John Kessler have also moved to be heard on the State's petition. Other than considering their motions and suggestions in support, the motions for a hearing on the State's petition will be denied. The State has moved for leave to file a reply to the motions to intervene, to dismiss and for a hearing on the petition. The motion for leave to file a reply will be granted.

David C. Jones, Assistant United States Attorney for the Western District of Missouri and who was assigned to the grand jury investigation of this matter has filed an

affidavit in which he does not oppose the State's petition. He states the documents requested may assist the State in determining the source and extent of any injury or damage to the State. Mr. Jones states that none of the documents requested to be disclosed would reveal the inner workings of the grand jury. The Court takes judicial notice that the term of the grand jury making the investigation has ended.

William E. Roussin, Susan K. Roach, Morris B. Kessler, John Kessler and William Landoff are defendants in a complaint filed by the State in the United States District Court for the Eastern District of Missouri. The defendants contend that disclosure of the documents will violate [sic] Rule 6(e) of the Federal Rules of Criminal Procedure; that the State is not the real party in interest and thereby lacks standing and has not shown a particularized need for disclosure of the documents.

The documents which the State petitions to be disclosed are as follows:

> 1. Correspondence to or from William Webster, William Roussin and/or Morris Kessler regarding either the Second Injury Fund or campaign contributions and any memoranda regarding the same authored by Webster, Kessler, Roussin, Susan Roach, or their employees and/or agents, including but not limited to employees of the Office of the Missouri Attorney General.
>
> 2. Interview notes, summaries or affidavits (excluding notes or summaries regarding witness testimony before the grand jury).

3. Notes, summaries, or charts regarding: settlement sums paid by the Second Injury Fund to claimants and/or their attorneys; contributions to William Webster, and/or; the relationship between settlement sums and campaign contributions.

4. Records, lists, computer files and/or reports regarding campaign contributions to Webster and/or his campaign committees, groups or associations.

5. Reports of statistical information or actual case files obtained from the Missouri Division of Worker's Compensation.

The Court will accept the statement of David C. Jones that the disclosure of the requested documents would not reveal the inner workings of the grand jury.

The State has shown a particularized need for disclosure of documents. The taxpayers have paid once for the production of these documents. They should not have to pay for the investigation and proceedings necessary for their production again. It is apparent that these documents would assist the State in information needed to prepare the case for trial pending in the Eastern District. It would be in the public interest that the requested documents be disclosed.

It is this Court's opinion that disclosure of the requested documents does not violate Rule 6(e). Since the term of the grand jury that investigated this matter has ended, any matter protected by Rule 6(e) would be minimal if any.

The State should have access to and use of the agents making the investigation for the grand jury so long as the

agents do not disclose the testimony that they have given before the grand jury. It is

ORDERED that the motions of Landoff, Roussin, Roach and the Kesslers to intervene are granted; and it is further

ORDERED that the motions of defendants Roach and Roussin to dismiss are denied; and it is further

ORDERED that the motions of defendants Roussin and the Kesslers for a hearing are denied; and it is further

ORDERED that the motion of the State to file a reply is granted; and it is further

ORDERED that the State's petition for a disclosure of the grand jury documents and access to agents investigating for the grand jury is granted.

/s/ Russell G. Clark
RUSSELL G. CLARK,
SENIOR JUDGE
UNITED STATES
DISTRICT COURT

Date: August 9, 1994

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION

IN RE: GRAND JURY INVESTIGATION OF WILLIAM L. WEBSTER, et al.	)))	Case No. 94-MC-9015

ORDER

(Filed Aug. 19, 1994)

Defendants William E. Roussin and Susan K. Roach have filed motions to stay the order of this Court issued August 9, 1994 which made certain documents available to the State of Missouri. Defendants state that the August 9 order will be appealed and if there is no stay the documents will have been produced making any appeal futile. Good cause having been shown, it is

ORDERED that the motions for a stay are granted; and it is further

ORDERED that the stay is to be effective through the time that an appeal may be filed or until the Eighth Circuit Court of Appeals has decided the issue presented in the August 9, 1994 order.

/s/ Russell G. Clark
RUSSELL G. CLARK,
SENIOR JUDGE
UNITED STATES
DISTRICT COURT

Date: August 19, 1994

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

STATE OF MISSOURI, Plaintiff, vs. WILLIAM E. ROUSSIN, et al., Defendants.	)	No. 4:93CV2633-DJS

ORDER

(Filed Jan. 14, 1994)

This matter is before the Court on plaintiff's three motions for attachment against the property of defendants Morris B. Kessler, V. John Kessler, Kessler and Kessler, P.C., Alex R. Shreim, Hala A. Shreim, William E. Roussin, Susan K. Roach, and the alleged Roussin and Roach partnership, a non-party. A hearing on the motion was held on December 22, 1993, at which counsel for plaintiff, defendants Roussin, Roach and Alex Shreim, all acting pro se, and counsel for all three Kessler defendants were present and participating. Following the hearing, the Court has received additional memoranda from the government and from all affected defendants except Hala Shreim.

Pursuant to Fed.R.Civ.P. 64:

> [A]ll remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances

> and in the manner provided by the law of the state in which the district court is held.

Plaintiff's motions are therefore governed by the applicable provisions of Mo.S.Ct.R. 85 and of Chapter 521 of R.S.Mo. All three motions for attachment invoke subsection (12) of the fourteen bases on which a writ of attachment may issue under § 521.010 R.S.Mo. Two of the three motions, those against the Shreims and Roussin and Roach, also invoke subsection (7) of the statute. In pertinent part, § 521.010(7) and (12) read as follows:

> In any court having competent jurisdiction, the plaintiff in any civil action may have an attachment against the property of the defendant, or that of any one or more of several defendants, in any one or more of the following cases: . . .
>
> (7) Where the defendant has fraudulently conveyed or assigned his property or effects, so as to hinder or delay his creditors; . . .
>
> (12) Where the damages for which the action is brought are for injuries arising from the commission of some felony or misdemeanor, or for the seduction of any female[.]

In order to obtain a writ of attachment ex parte, the State bears the burden of making a "factual showing of probable cause" that these grounds exist to support the issuance of the writ. *See Phillips v. Hasty*, 775 S.W.2d 191, 194 (Mo.App. 1989). Although most of the affected defendants participated in the hearing on plaintiff's motions, the Court would nonetheless apply this same standard when considering whether the extraordinary provisional remedy of attachment is warranted.

Fed.R.Civ.P. 64 speaks of remedies providing for seizure of property "for the purpose of securing satisfaction of the judgment ultimately to be entered in the action." Mo.S.Ct.R. 85.03(a) echoes this idea by requiring that the affidavit in support of a motion for attachment state the "nature and amount of the claim." Plaintiff's complaint, 98 pages in length, contains seventeen counts. Of the seventeen, only in connection with the "Fifteenth Claim for Relief" does the State pray for a specific amount of actual damages, "believed to be the sum of $30,000," against defendants Joan Comici, Erio Comici, Roussin and Kelleher. Complaint, p.97. Otherwise, the complaint seeks unspecified actual damages, and, where available, treble damages and unspecified punitive damages. The declarations of Edward R. Ardini, Jr., Assistant Attorney General, in support of the Kessler and Roussin/Roach motions attest that the State's claims against these defendants exceed $1,500,000. The Shreim declaration states that the State's claims against the Shreims exceed $1,050,000. These amounts are not supported by the complaint, the motions for attachment or the supporting declarations and other documentation.

As to attachment on ground (12), based on "injuries arising from the commission of some felony or misdemeanor," the Court presumes that plaintiff would ask the Court to take judicial notice of the convictions upon which it bases its motion. No proof of the convictions is supplied. Instead, copies of the stipulations of fact relative to sentencing signed by defendants Roussin, Morris Kessler, V. John Kessler and Alex Shreim have been filed, as well copies of the charging instruments from those cases. Presuming that these documents demonstrate the

charges of conviction, attachment based on subsection (12) must, in the Court's view, be justified by and be limited to an amount of claimed injury shown to arise directly from the conduct constituting the crime(s) of conviction.

Plaintiff has failed to demonstrate such a link. The most extreme example of this failure is with respect to V. John Kessler, whose conviction was for lying to the grand jury. He may ultimately be shown to be liable to the State in this civil action based on other conduct, but the State has not demonstrated a compensable injury arising from the conduct of conviction, i.e., lying to the grand jury, much less a compensable injury arising therefrom which warrants attachment of property valued at $1,500,000.00 Similarly, the Court is not persuaded that this ground for attachment applies against the property of Kessler & Kessler, P.C. and the alleged but disputed law partnership of Roussin & Roach.

As to attachment on ground (7), based on fraudulent conveyance of assets, plaintiff's speculative allegations concerning the Shreims' divorce do not constitute the factual showing of probable cause required to support the issuance of the writ on this ground. Plaintiff alleges that defendant Roussin admitted under oath, during the sentencing hearing in *United States v. William L. Webster,* No. 93-03243-01-S-4-9, in the United States District Court for the Western District of Missouri, that he had transferred assets to his wife, Susan Roach, for the purpose of evading potential judgment creditors. Accepting that allegation as true only for purposes of

these motions,[1] attachment is nonetheless unwarranted under subsection (7). Plaintiff asserts numerous claims against defendant Roach in her own right, jointly and severally with Roussin. In these circumstances, where Roach, the alleged transferee, is also before the Court defending against personal liability to the State, the alleged transfers by Roussin do not serve to "hinder or delay" plaintiff as a potential creditor, within the meaning of subsection (7).

To the extent plaintiff seeks, as an alternative to attachment, a preliminary injunction restraining the affected defendants from making "non-routine asset transfers," the Court concludes that plaintiff has not made the necessary showing that the relevant factors – a threat of irreparable harm, the balance of the resulting harms to the parties, plaintiff's likelihood of success on the merits and the public interest – weigh in favor of such preliminary relief.

In opposition to the motions for attachment, several defendants have asserted arguments on the merits of plaintiff's complaint which are more appropriate to a motion to dismiss. For example, these arguments raise issues concerning the viability of the State's RICO claims, the existence of a legal partnership between defendants Roussin and Roach, and whether restitution ordered paid by defendants as part of their punishment in criminal cases precludes any additional civil liability. Because the resolution of these issues is not necessary or appropriate

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[1] Roussin and Roach dispute the State's characterization of the testimony upon which it relies.

in the present context, the Court will not address them here.

The reaction of the citizens of Missouri to disclosures of fraud and abuse involving the Second Injury Fund and the Missouri Attorney General's Office has been justifiably adverse. The State now seeks to recover for losses it claims were sustained as a result of allegedly fraudulent and otherwise illegal conduct by the number of individuals named as defendants in this action. Public attention to this case may not be permitted to influence the Court's performance of its duty to decide the issues placed before it based on the facts established in the record of this case and the law determined by the Court to be applicable to the types of legal claims asserted by the State. The provisional remedy of attachment of a defendant's property prior to a determination of his or her liability is an extraordinary measure which is available only under limited circumstances set forth in the statute. The State bears the burden of establishing that such circumstances exist. Upon careful consideration of the pertinent case law, statutes, and rules, the documentary record and the arguments and memoranda of the parties, the Court is not persuaded that the State has met its burden of demonstrating that subsections (7) and (12) of § 521.010 are applicable here to justify the attachment of millions of dollars worth of the property of the defendants against whom the State's motions are directed.

Accordingly,

IT IS HEREBY ORDERED that plaintiff's motion for attachment against the property of Morris B. Kessler, V. John Kessler and Kessler and Kessler, P.C. [Doc. #3],

motion for attachment against the property of William E. Roussin, Susan K. Roach and Roussin and Roach [Doc. #4], and motion for attachment against the property of Alex R. Shreim and Hala A. Shreim [Doc. #5] are denied.

IT IS FURTHER ORDERED that the motions by defendant William E. Roussin and Susan K. Roach for hearing on the propriety of attachment are denied as moot.

IT IS FURTHER ORDERED that defendants William E. Roussin and Susan K. Roach's motions to quash the motion for attachment, "additional addendum motions" to quash motion for attachment [Docs. #11 and #12], and "addendum motions" to quash motion for attachment [Docs. #13 and #14] are denied as moot.

/s/ D.J. Stohr
UNITED STATES
DISTRICT JUDGE

Dated: 1/14/94

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-3241/3243WMS	*	
In re: Grand Jury Investigation	*	Appeal from the United States District Court for the Western District of Missouri
----------	*	
State of Missouri,	*	
Appellee,	*	
vs.	*	
W.E.R., et al.,	*	
Appellants.	*	

Appellant W.E.R.'s petition for rehearing by the panel in case No. 94-3241, adopted by appellant S.K.R. in case No. 94-3243, has been considered by the Court and is denied.

June 29, 1995

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

Rule 6(e) Federal Rules of Criminal Procedure

* * *

(e) Recording and Disclosure of Proceedings.

(1) Recording of Proceedings. All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.

(2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to –

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made, and shall certify that the attorney has advised such persons of their obligation of secrecy under this rule.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made –

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding;

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury;

(iii) when the disclosure is made by an attorney for the government to another federal grand jury; or

(iv) when permitted by a court at the request of an attorney for the government, upon

a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

(D) A petition for disclosure pursuant to subdivision (e)(3)(C)(i) shall be filed in the district where the grand jury convened. Unless the hearing is ex parte, which it may be when the petitioner is the government, the petitioner shall serve written notice of the petition upon (i) the attorney for the government, (ii) the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding, and (iii) such other persons as the court may direct. The court shall afford those persons a reasonable opportunity to appear and be heard.

(E) If the judicial proceeding giving rise to the petition is in a federal district court in another district, the court shall transfer the matter to that court unless it can reasonably obtain sufficient knowledge of the proceeding to determine whether disclosure is proper. The court shall order transmitted to the court to which the matter is transferred the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand jury secrecy. The court to which the matter is transferred shall afford the aforementioned persons a reasonable opportunity to appear and be heard.

(4) Sealed Indictments. The federal magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no

person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

(5) Closed Hearing. Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury.

(6) Sealed Records. Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury.

* * *